# No. 6544

IN THE

# United States Circuit Court of Appeals

## For the Ninth Circuit

WARREN H. PILLSBURY, Deputy Commissioner of the United States Employees' Compensation Commission for the 13th Compensation District, and CHARLES KUGLAND,

*Appellants,*

vs.

THE CHARLES NELSON COMPANY (a corporation), and FIREMAN'S FUND INSURANCE COMPANY (a corporation),

*Appellees.*

## BRIEF FOR APPELLEES.

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## BRIEF FOR APPELLEES.

### Statement of Case.

This is one of four test cases now pending before this Court. Each case presents the question of the construction of Section 10 of the Longshoremen's and Harbor Workers' Compensation Act (33 U. S. C. A. 910), with respect to the method of computing compensation. The decisions in the other test cases are reported as follows:

*Mahony v. Marshall,* 46 Fed. (2d) 539 (Wash.);
*Pac. S. S. Co. v. Pillsbury,* 52 Fed. (2d) 686 (Calif.);
*Nelson v. Pillsbury,* 48 Fed. (2d) 883 (2 California cases, one of which is the case now before this Court.)

In all of these cases as well as in *Luckenbach v. Marshall,* 49 Fed. (2d) 625 (Oregon), the District Courts have set aside awards of the Deputy Commissioner and have upheld the contention now urged by the appellees.

As will be hereinafter brought out, the Longshoremen's Act is based upon the fundamental principle that an injured employee shall receive 66 2/3 per cent of his average weekly wage. The Deputy Commissioner has computed Kugland's compensation under subdivision (b) instead of subdivision (c) of Section 10, and by acting upon the erroneous theory that another longshoreman named Davidson was "an employee of the same class" as Kugland, made an award of compensation to Kugland which is in fact considerably more than 66 2/3 per cent of his earning capacity. Such a result is repugnant and contrary to the whole theory and practice of all workmen's compensation acts and would place a handsome premium upon industrial injuries and encourage malingering and self-inflicted disabilities. The District Court set aside the award of the Deputy Commissioner (*Nelson v. Pillsbury,* 48 Fed. (2d) 883) and this appeal has been taken from the decree of the District Court.

The facts are undisputed, notwithstanding the intimation in appellants' brief to the effect that there is some conflict in the evidence arising out of the testimony of the witness Stein, upon which further comment will be hereinafter made.

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### EVIDENCE AS TO KUGLAND'S EARNINGS.

It was stipulated before the Deputy Commissioner that the testimony presented in a companion case involving an employee named Lawler, which was consolidated for trial before the Deputy Commissioner with the present case and which is now pending before this Court under the same title of *Pillsbury v. The Charles Nelson Co.,* et al., numbered 6543, might be considered a part of the record in the present case. The following summary of the facts therefore includes the testimony in the *Lawler* case, a transcript of which is also before this Court.

Kugland originally testified that he had worked 278 days during the year preceding his injury, and that he earned $38 or $39 a week. Upon further examination, however, he modified these assertions considerably, and appellants' brief (p. 2) concedes that he worked approximately 260 days during that year and earned $30 or $35 a week, so that 66⅔ per centum of these weekly earnings would entitle Kugland to from $20 to $23.32 weekly compensation. He averaged not more than 5 days' work a week, and was not a regular member of a gang.

It will be noted that contrary to Kugland's uncorroborated testimony as to his earnings, the companies with whom he claimed to have been working submitted wage statements greatly at variance with his claims, showing that his total earnings had amounted to $870.37. Kugland claimed to have worked a number of days with various employers who did not file wage statements with the Commissioner, and also to have earned $75 doing some trucking work. (Test. Kugland case, Exh. "F," page 3.)*

There was no evidence of any lay-offs or illness, and the record shows that he took every job he could get, and would have taken more work had it been available. (Test. Kugland case, Exh. "A," pp. 7-8.) We have a case, therefore, of a longshoreman who, by his own admission, earned not more than $35 a week throughout the whole year prior to his injury, although he at all times was ready to and did work as steadily as was possible, taking into consideration his own ability, experience, physical condition, and desire and opportunity to find work.

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EVIDENCE AS TO LONGSHORING CONDITIONS IN GENERAL.

The evidence introduced in this case consists very largely of the testimony of expert witnesses relative to longshoring conditions in San Francisco. This testimony may be briefly summarized as follows:

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*"Test." used to refer to testimony introduced before the Deputy Commissioner.

Christian H. Hansen, pier superintendent of the Nelson S. S. Co., testified as follows (Test. Lawler case, Ex. "B," pp. 5-16):

Stevedores are divided into three general classes, each class being roughly estimated at one-third of the total number. In the first class are those who have proved themselves the best stevedores because of their experience, reliability and physical fitness. These men work in steady gangs and are always picked first when work is available. The second class of stevedores includes those who are perhaps a little less reliable and not able to do all the different kinds of work. In the third class are included the men who are picked up for small jobs or when there is a shortage of men. The men in the first class have the highest average earnings, which run from $160 to $185 a month and sometimes higher. The men in the second class average between $125 and $150. The men in the third class earn from $65 to $100 a month. Included in this last class are a large number of men referred to by the witness as "winos" and "drifters," who make no pretense of working regularly, but work just enough to live. This witness, in referring to the "winos" says, "all they do they get their pay and drink it up." In addition to those in the third class who work just enough to get something to eat and drink are those who are physically unfit, elderly, or ill, and therefore incapable of obtaining steady employment.

George Ortiz, paymaster of the Los Angeles Steamship Co., testified as follows (Test. Lawler case, Ex. "B," pp. 16-25):

There are three different types of stevedores. In the first place there are steady gangs who are hired at all times. Then there is a second type which tries to get work regularly, but is not as well qualified and therefore not as regularly employed. In the words of this witness there is also "the riff raff gang that comes around that will work a day and you probably won't see them again for a month or two months." The Los Angeles Steamship Co., by whom this witness was employed, did not get the best class of stevedores because their vessels were only in port 4½ hours a day, and it was therefore impossible for a good man to make very much at the usual rate of 90¢ an hour. The best man with this company averaged about $1200 a year, and those in the second class, $700 or $800 a year.

Max N. Kahn, office manager of the California Stevedore & Ballast Company testified as follows (Test. Lawler case, Ex. "D," pp. 2-25):

That his company was the biggest contract stevedore company in this section, hiring from 200 to 1000 stevedores a day. There are three different classes of stevedores. In the first class are "the men that leave the house in the morning and know just where they are going to work. He is employed practically steadily by that particular firm he works for most of the year or all of the year." These men are in steady gangs and make about $165 or $170 a month. In the second class "are men that come down to the water-front and they work for practically one firm also but they don't get as much work. That is, there is not as much work there. They don't make as much overtime work, etc.

In discharging ships they don't make as much as loading ships." The average earnings of this second class are $135 or $140 a month. In the third class of men are those who only want to work a certain number of days and some of these want to earn "just enough to drink on and they quit." These third class men make about $65 a month, perhaps as high as $80 or $85 a month. There is nothing certain or regular about a stevedore's employment. They are employed by the hour and paid by the hour. The employment is casual and erratic as a man may be able to work 2 hours one day, 10 the next, and no hours the next day. Some of the biggest docks sometimes have only 3 or 4 hours work a day and then again there will be work continuously for a full day and night. The witness did not know of any dock in San Francisco where a stevedore was employed for an eight-hour day's work, or for a five and a half-day week. When a vessel comes in the work starts, and ceases when the cargo is discharged. The stevedores in the first class make the most money because they have the greatest ability and strength for doing all kinds of work. Through experience they have become trained stevedores and understand the diversified ways of stowing cargo, handling machinery and any other kind of work, whereas in the third class are many men who are not really stevedores, in the professional sense of the word, but just laborers. Most of the men in the second class work as many days as the first class men, but do not earn as much because they do not get overtime or work as many hours. The men in the third class do not work 270 days a year.

The witness Kahn, in behalf of the California Stevedore & Ballast Company, furnished the Deputy Commissioner with a letter containing a wage statement for the three employees of that company who had been most steadily employed during the year prior to Kugland's injury, all of them having worked over 270 days. This letter was introduced as an exhibit and is set forth verbatim in the record. (Test Lawler case Ex. "B," p. 4.) The witness testified that this letter listed the three men who were the highest paid men in the employ of the California Stevedore & Ballast Company. One of these men, Davidson, who worked the most days and had the highest earnings of all, $2138.95, is the man whose annual earnings were used by the Deputy Commissioner in computing Kugland's compensation in the present case.

A. Nelson, general foreman of the Nelson Steamship Company, testified as follows (Test. Lawler case Ex. "D," pp. 25-38):

There are three classes of stevedores. In the first class are those who stay with stevedoring at all times, making a regular living from it, and are skilled in their work. They earn about $175 a month. In the second class are men who come to the water-front and are not sufficiently skilled to work in gangs, therefore earning between $140 and $150 a month. In the third class are those that "don't exactly want to work, just want to get a little money now and then." They earn perhaps $75 to $100 a month, not only because of their lack of skill, but because "today they are drunk and tomorrow they are sober, and those men you can never take a chance on." All stevedoring work is

paid at the rate of 90¢ an hour, and $1.35 overtime, and there is no such thing as hiring stevedores for an 8 hour day's work. The men in the first class will average 5 days' work a week, whereas the men in the second class fall a little below that.

The testimony of Lawler is both interesting and relevant as it applies to the third classification of longshoremen. Lawler is the claimant in the companion case to the present one. Both cases were consolidated for trial before the Deputy Commissioner, were argued together before the District Court, and are both now before the Circuit Court. Lawler testified as follows:

During 9 months of the year prior to his injury, Lawler averaged not more than 4 days of work a week, and did not work at all during the remaining 3 months because of illness. He kept no record of his earnings or of the amount of work performed, but stated that his monthly earnings while working "might have been $100." (Test. Lawler case, Ex. "A," p. 3.) He was not on a steady gang, but was down at the San Francisco water-front looking for work 6 and even 7 days a week. He described himself as a "prospector" of whom there were at least a thousand within his personal knowledge, and these "prospectors," according to his own statement, earned less than the men on the steady gangs. Lawler admitted that he earned even less than the rest of the "prospectors," because, to use his own words, "I am always looking for conditions on a job and I never hesitate to tell the boss when anything is wrong. I am the fall guy, but I tell's him what's what. Naturally

I am not wanted very much." (Test. Lawler case, Ex. "A," p. 5.) Like all other longshoremen he received 90¢ an hour while working.

Appellants' brief contends that the Commissioner, in making his award, found that San Francisco stevedores were not divisible into three distinct classes and that such a finding is amply supported by the testimony of the witness Stein. It should be noted that the findings of the Deputy Commissioner do not include any express finding as to whether there are or are not various classes of stevedores. The evidence, as hereinbefore summarized in this brief, clearly and unmistakably shows the existence of three general classes of stevedores, such classification being based upon skill, experience, physical ability, opportunity and desire to work, which factors are reflected by their annual earnings. This evidence is not contradicted by the testimony of the witness Stein, an officer of the Longshoreman's Association, who merely said "I have never heard it mentioned that there are three classes of stevedores, as brought out by other witnesses here." (Test. Lawler case Ex. "D," p. 40.) He testified to no facts which would rebut the definite and positive evidence of appellees' witnesses, and on the contrary conceded that there were "good, bad and indifferent stevedores"; that there were stevedores "who have more or less permanent places on gangs, who can count on the same gang foreman picking them up for every job if they are down there" (Test. Lawler case Ex. "D," p. 41), and that the members of such gangs were always called on first when there was a ship to load or unload. Whether or not there are different

classes of longshoremen is obviously a question of law to be determined by the Court from the facts disclosed by the record with respect to actual conditions on the water-front, and Mr. Stein's statement that he has never heard of three classes of stevedores does not set up a conflict in the record.

It is evident from the testimony as a whole that a stevedore's employment is of an irregular, casual, erratic and unusual nature. While every stevedore is paid at the same rate for an hour's work, there is no such thing as employment for an 8 hour day or a 5 or 6 day week. Each man is employed for a certain job on a certain vessel which may last for a greater or less number of hours, and he is paid at an hourly rate. As a natural result of these factors, which are peculiar to longshoring, the earning power of each individual is directly dependent upon his skill, physical ability, experience, and the desire and opportunity to work. The three general classifications referred to by the witnesses are the normal groupings which necessarily result from the very nature of the work and the foregoing factors. We do not contend, as intimated by the appellants' brief, that these clearly defined classifications are based upon earnings alone, but we do contend that annual earnings reflect accurately the aforesaid skill, physical ability, experience, desire and opportunity of the individual employee, and hence his classification.

THE COMMISSIONER'S METHOD OF COMPUTING COMPENSATION.

The sole questions before this Court are (1) whether, under the particular facts of this case, Kugland is entitled to receive compensation computed under subdivision (b) or subdivision (c) of Section 10 of the Act, and (2) regardless of whether subdivision (b) or (c) is used, whether another longshoreman, Davidson, was an employee of "the same class." Section 10 is as follows:

> "Sec. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:
>
> (a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.
>
> (b) If the injured employee shall not have worked in such employment during substantially the whole of such year, *his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class* working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.
>
> (c) *If either of the foregoing methods of arriving at the annual average earnings of an in-*

*jured employee can not reasonably and fairly be applied,* such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, *shall reasonably represent the annual earning capacity* of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings." (Italics ours.)

The Deputy Commissioner computed Kugland's compensation under Section 10 (b) in the following manner: In order to find the average daily wage of "an employee of the same class working substantially the whole of such immediately preceding year" the Commissioner fixed upon the earnings of Davidson, who as heretofore pointed out was the *highest paid and most steadily employed* man on the records of the California Stevedore & Ballast Co., who had worked 297 days of the preceding year and whose annual earnings were $2138.95. (It will be remembered that Kugland's actual earnings for the preceding year, even according to his own uncorroborated statement, were somewhere between $1560 and $1820 a year, and according to the wage statements were less than $1000.) Dividing $2138.95 by 297, the Commissioner ascertained that Davidson's earnings for each day that he was employed, amounted to $7.20. By multiplying $7.20 by 300, as required by Section 10 (b), he estimated Kugland's "average annual earn-

ings'' to be $2160. Dividing these ''annual earnings'' of $2160 by 52, as provided by Section 10 (d), he estimated Kuglands's weekly earnings at $41.54, although Kugland's own testimony shows that his actual weekly earnings had been from $30 to $35. As 66⅔ per centum of $41.54 exceeds the maximum of $25 per week allowed by the Act, the award allowed Kugland $25 per week, or considerably more than 66⅔ per centum of his actual weekly earnings.

Section 10 (c) provides that if the method of arriving at the average annual earnings provided by Section 10 (b) ''can not reasonably and fairly be applied,'' such annual earnings shall be computed as provided by Section 10 (c), which provides a method for arriving at a figure which ''shall reasonably represent the annual earning *capacity* of the injured employee.''

The award of the Commissioner herein was set aside by the District Court *(Nelson v. Pillsbury,* 48 Fed. (2d) 883), with directions to the Commissioner to compute Kugland's compensation in accordance with Section 10 (c), and the opinion points out that Davidson is not in the ''same class'' as Kugland and that the statute did not contemplate the use, as a basis for computation, of the average daily wage of a man of a group with higher earning power than that to which the injured employee belonged. If, therefore, this Court is of the opinion that the foregoing method of computation applied by the Deputy Commissioner can not reasonably and fairly be applied to the facts of the present case, the decree of the District Court herein should be affirmed.

**Argument.**

The Longshoremen's Act, like all other workmen's compensation acts, is governed by the fundamental and universally recognized principle that compensation shall be based upon a certain percentage of the workman's actual earnings, if such earnings fairly represent his earning capacity.

Section 8 of the Longshoremen's Act fixes the rate of compensation at 66⅔ per centum of the average weekly wages. The purpose of allowing only a percentage of the workman's earnings while he is disabled is of course obvious. There is the practical necessity of giving the injured employee some incentive to return to work, and in the case of the present Act, this incentive is the loss of a third of a man's normal earning capacity. As is shown by the record, at least two-thirds of all the stevedores in San Francisco earn considerably less than did Davidson, the highest paid and most steadily employed man with the California Stevedore & Ballast Co., who was selected by the Commissioner as a standard for computation. We believe that no further comment along this line is necessary to direct the attention of this Court to the tremendous harm that would result from a judicial construction of Section 10 which would permit a great majority of injured employees to receive compensation based upon the earnings of the highest paid and most steadily employed of their number, and in many instances would result in employees receiving more compensation than their former wages. Compensation based upon such a method of computation would not only add a tremendous financial burden to the whole

industry, but would encourage malingering and prolong the period of disability by giving a man no incentive to return to work, and in fact would place a premium or reward upon the prolongation of disabilities. Such a result is highly undesirable and contrary to all social and legal principles.

Section 10 of the Act merely prescribes the mechanism for ascertaining what the employee's average earnings were, and must be construed with a view to carrying out the primary principle that compensation must be based upon only a percentage of the average earnings. The Deputy Commissioner has in effect nullified and set aside the fundamental purpose of the Act by the manner in which he has construed a portion thereof.

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COMPARISON WITH THE NEW YORK COMPENSATION ACT.

Section 10 of the Longshoremen's Act must be construed in such a manner as to carry into execution the purpose of the Act as a whole.

*Brown v. Duchesne,* 19 Howard 183, 194;
*Pollard v. Bailey,* 20 Wallace 520, 525.

The Longshoremen's Act was enacted in 1927 and was borrowed practically without change from the Workmen's Compensation Act of New York. Section 10 of the Longshoremen's Act follows Section 14 of the New York Compensation Act almost verbatim. It must be presumed, therefore, that Congress, in adopting the Act from New York, accepted judicial con-

structions which had been placed on the New York Act prior to the passage of the Federal Act.

*Willis v. Eastern Trust & Banking Co.,* 169 U. S. 295, 307, 18 Sup. Ct. 347, 352;

*Welsh v. Barber Asphalt Paving Co.,* 167 Fed. 465, 472;

*Hamilton v. Russel,* 5 U. S. (1 Cranch) 309, 316, 2 L. Ed. 118;

*Tucker v. Oxley,* 9 U. S. (5 Cranch) 34, 42, 3 L. Ed. 29;

*Interstate Commerce Commission v. B. & O. Railway Co.,* 145 U. S. 263, 284, 12 Sup. Ct. 844, 850, 36 L. Ed. 699;

*Sexton v. Dreyfus,* 219 U. S. 339, 344, 31 Sup. Ct. 256, 257, 55 L. Ed. 244;

*Brown v. Walker,* 161 U. S. 591, 601.

In *Texas Employer's Insurance Asso. v. Sheppeard,* 32 Fed. (2d) 300, 1929 A. M. C. 776, the Court said, in construing a section of the Longshoremen's and Harbor Workers' Compensation Act,

> "but the courts of New York, from which the provision was taken verbatim, have construed it that way, and it is a fundamental rule of statutory construction that the adoption of a statute of another state which has been construed in the courts of that state, carries that judicial construction with it in the adopting state."

> "* * * If Congress, which has adopted the New York Act and the construction which the New York courts have put upon it, desires to change the statute so as to avoid either the language or the construction placed upon it by the New York courts, it may do so, but until it does

> so the Commission must administer the Act as it is written, and as it has been interpreted, and not under an arbitrary rule conceived by it to be more beneficial than the one prescribed by statute."

The New York decisions recognize the fundamental principle that compensation must not exceed the actual earning capacity of the employee.

*In re Cohen,* 162 N. Y. S. 424;
*Remo v. Shenandoah,* 179 N. Y. S. 46;
*Rooney v. Great Lakes,* 180 N. Y. S. 652;
*Roskie v. Amsterdam,* 181 N. Y. S. 891;
*Fredenburg v. Empire,* 154 N. Y. S. 351;
*Littler v. Fuller,* 223 N. Y. 369, 119 N. E. 554.

The Court used the following language in *In re Cohen* (supra):

> "The effort of the commission should have been to determine the average weekly wages of the claimant in accordance with the facts, and according to the conditions as they actually existed, and not according to some theoretical conditions, which, had they existed, might have increased the earnings of the claimant."

Where the nature of the industry is such that continuous, regular work can not be obtained throughout the year, the section of the New York Act equivalent to Section 10 (c) of the Longshoremen's Act must be used.

*Remo v. Shenandoah,* 179 N. Y. S. 46;
*Rooney v. Great Lakes,* 180 N. Y. S. 652;
*Belliamo v. Marlin-Rockwell Corp.,* 213 N. Y. S. 85;

*Geroux v. McClintic-Marshall,* 233 N. Y. S. 402.

In *Littler v. Fuller,* 223 N. Y. 369, 119 N. E. 554, the Court said:

> *"Three hundred days' work in the year is the standard of steady employment.* 'The average weekly wages of an employe shall be one fifty-second part of his average annual earnings.' Section 14, subd. 4. *The award should not exceed two-thirds of the earning capacity.* Average annual earnings are computed under subdivisions 1, 2 or 3 of Section 14, as the case requires. *If the nature of the employment does not permit steady work during substantially the whole of the year the annual earning capacity of the injured employe in the employment is the proper basis of compensation.* Section 14, subd. 3. *The true test is this: What were the average weekly earnings, regard being had to the known and recognized incidents of the employment, including the element of discontinuousness?"* (Italics ours.)

It has been repeatedly held that the New York sections corresponding to Sections 10 (a) and (b) of the Longshoremen's Act can not fairly and reasonably be applied except to employments providing regular work for a full six day week. The following decision is of interest in this respect.

*In re Prentice,* 168 N. Y. S. 55:

> "Subdivisions 1 and 2 of the section provide that in cases included within such subdivisions the average annual earnings shall consist of 300 times the average daily wage or salary. The number 300 used in those subdivisions is not an arbi-

trary selection, but was evidently selected because it bears an approximately close relation to the number of working days in the year, Sundays and holidays excluded. Manifestly, where an employee works seven days a week for substantially an entire year, the method of determining his average annual earnings, indicated in either subdivision 1 or 2, would be an injustice to him, just as much as it would be an injustice to the employer to apply those subdivisions to a case where the injured employee has worked less than six days a week for a substantial period of time. The claim here falls more appropriately within subdivision 3."

The New York decisions hold that the subdivisions of the New York Act corresponding to subdivisions (a) and (b) of Section 10 can not be reasonably and fairly applied to workmen in seasonal employments, and that the equivalent of subdivision (c) should be applied.

*Gruber v. Kramer Amusement Corp.,* 202 N. Y. S. 413, 414, 415;

*Deverso v. Parsons,* 225 N. Y. S. 78;

*Burg v. Henry P. Burgard Co.,* 204 N. Y. S. 686;

*Darby v. New York Canners Co.,* 212 N. Y. S. 795;

*Kapler v. Camp Taghonic, Inc.,* 213 N. Y. S. 160;

*Blatchley v. Dairymen's League Coop. Ass'n.,* 232 N. Y. S. 437;

*Orlando v. Snider Packing Corp.,* 246 N. Y. S. 224.

The same rule has been followed in other states with respect to seasonal occupations.

*Scott's Case,* 118 Atl. 236;

*Cramer v. West Bay Sugar Co.,* 167 N. W. 843;

*Kirchner v. Michigan Sugar Co.,* 173 N. W. 193;

*Rainbow Gardens v. Industrial Commission,* 202 N. W. 329.

It is clear therefore that subdivisions (a) and (b) of Section 10 can not reasonably and fairly be applied to an employee who is engaged in work which does not afford him approximately 300 days of regular work a year. The 300 day multiplier referred to in these two subdivisions can reasonably and fairly be applied only where there is regular 6 day employment throughout the year. If a man has been working 7 days a week, the application of the 300 day multiplier is obviously to his disadvantage and has been held not to apply to such cases.

*Howard v. Texas Employers' Ins. Ass'n.,* 292 S. W. 529;

*Petroleum Casualty Company v. Williams,* 15 S. W. (2d) 553.

It is equally true that where an employee averages less than 6 days a week, the application of the 300 day formula is unreasonable and unfair.

*In re Prentice,* 168 N. Y. S. 55;

*Littler v. Fuller,* 223 N. Y. 369, 119 N. E. 554;

*Remo v. Shenandoah,* 179 N. Y. S. 46;

*McDonald v. Burden Iron Co.,* 201 N. Y. S. 720;

*Kittle v. Town of Kinderhook,* 212 N. Y. S. 410;

*Belliamo v. Marlin-Rockwell Corp.,* 213 N. Y. S. 85;

*Deverso v. Parsons,* 225 N. Y. S. 78;

*Geroux v. McClintic-Marshall Co.,* 233 N. Y. S. 402, 403;

*Employers Liability Assurance Corp. v. Butler,* 20 S. W. (2d) 209 (Tex., 1929);

*Texas Employers' Ins. Ass'n. v. Mitchell,* 27 S. W. (2d) 600 (Texas 1930).

The 300 day multiplier is merely a convenient formula for computing average annual earnings in standard cases which arise out of industries providing constant and regular employment. The Legislature recognized that a fair result would be produced only when the formula was applied to standard cases, and therefore provided in subdivision (c), an additional method of computing compensation in cases where (a) and (b) would be unfair or unreasonable.

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DECISIONS IN STATES OTHER THAN NEW YORK.

A California decision which supports our contentions is

*Mehaffey v. Industrial Accident Commission,* 176 Cal. 711, 713, 171 Pac. 298 (1917.)

In this case the Court used the following language in construing a clause in the California Workmen's Compensation Act similar to Section 10 of the Longshoremen's Act:

> *"Both subdivisions 1 and 2 contemplate a kind of employment which is permanent and steady, and which, for that reason, affords to an employee the possibility, at least, of earning annually an amount measured by the number of working days in a year, estimated and fixed by the act at three hundred. Where this kind of employment is not shown to exist, the case falls within subdivision 3,* under which the annual earnings are to be taken as the sum which will 'reasonably represent the average annual earning capacity' of the employee 'in the kind of employment in which he was then working, or in any employment comparable therewith, but not of a higher class.' *Under this subdivision, the amount of annual earnings is not reached by multiplying the employee's daily earnings by any arbitrary figure, but by ascertaining from the evidence what his earning capacity in fact was. The evidence before the commission did not show that Rees could have earned* in the employment in question or in any employment comparable to it, *anything more than the amount which he had actually earned in the past,* which was but a fraction of the amount fixed by the commission as his average annual earnings." (Italics inserted.)

The California Industrial Accident Commission applied these principles to the case of a longshoreman in the case of

> *Employers' Liability Assurance Corp. v. Figroid* (1916), 3 Ind. Acc. Comm. of Cal. 46, 47.

In

*Andrejwski v. Wolverine Coal Co.,* 148 N. W. 684 (Mich. 1914),

it was said:

"To charge this employment with compensation for injuries to its employes on the same basis as employments which operate during substantially 300 days in the year would be an apparent injustice, *as such compensation would be based on the theory of impossible earnings by the employe in that employment* which operated upon the average a trifle over two-thirds of a working year. (Italics inserted.)

To the same effect is

*Utah Fuel v. Industrial Commission* (Utah), 201 Pac. 1034;

*De Mann v. Hydraulic Engineering Co.,* 159 N. W. 380, 381;

*Campbell v. Cummer-Diggens Co.,* 171 N. W. 395.

Subdivision (c) is obviously intended to cover cases where the arbitrary mathematical formula recognized by subdivisions (a) and (b) can not be used. Under subdivision (c) the Commissioner can determine the man's "annual earning capacity" with due regard to his own individual record of earnings, and his opportunities for obtaining employment. It is well recognized that the element of discontinuousness of work must be considered.

*Anslow v. Cannock Chase Colliery Co., Ltd.* (1909), App. Cas. 435, 437.

"The object of the Act broadly stated is to compensate a workman for his loss of capacity to earn, which is to be measured by what he can earn in the employment in which he is, under the conditions prevailing therein, before and up to the time of the accident. If he takes a holiday and forfeits his wages for a month, then that does not interfere with what he can earn. It is only that for a month he did not choose to earn. So, too, if there be a casualty accidentally stopping the work. But if it is a part of the employment to stop for a month in each year, then he cannot earn wages in that time in that employment, and his capacity to earn is less, over the year.

"I agree with what the learned Master of the Rolls says in his judgment when he uses the following language: 'In my opinion the true test is this: What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked.' "

And in

*Perry v. Wright,* 1 K. B. 441, 459, 462,

it was held that consideration should be given both to the nature of the employment and to the individual qualifications of the workman, including the fact that he "was a man of poor physique owing to drink and did not stick to his work."

The Court said in

*White v. Wiseman* (1912), 3 K. B. 352, 357:

"I take it to be a normal and recognized incident of most employments that a man takes the

risk of getting more or less work as his employer has it. It is not the case of anything sudden or unexpected."

To the same general effect are the following English cases:

*Carter v. John Lang & Sons,* 16 Sc. L. T. 345, 348 (1908);

*Cain v. Frederick Leyland & Co., Ltd.* (1908), 1 K. B. 441, 444;

*Barnett v. Port of London Authority* (1913), 2 K. B. 115;

*Edge v. J. Gorton, Ltd.* (1912), 3 K. B. 360.

That these principles have been followed in the American decisions is illustrated by the following language in

*Centralia Coal Corporation v. Industrial Commission,* 130 N. E. 725, 726 (Illinois, 1921):

"If Sundermeyer was unable to earn the average amount earned by miners in the mine of plaintiff in error by reason of his own inability or lack of industry, he is not entitled to have his compensation computed upon a basis of the average earnings of miners in that mine. To hold him so entitled would be to place a premium upon idleness and inefficiency. The case is different, however, where his inability to earn as much as the average miner in the mine is not due to his fault, or to the fact that he is below an average miner, but is due to a condition under which he is put to work by his employer, which is not a normal and recognized incident of the employment."

LONGSHORING IS A DISCONTINUOUS AND CASUAL EMPLOYMENT.

The unusual and irregular character of a longshoreman's employment is shown not only by the testimony presented in this case, but also by judicial decisions elsewhere. The case of

*Perry v. Wright* (1908), 1 K. B. 441,

uses the following language in connection with computing compensation for a longshoreman:

> "If such a man were paid by the day his average weekly earnings would be the totality of his earnings during the relevant period divided by the number of weeks in that period. His normal week would not be a week in which he was employed through the whole of the six days, but would be a week in which he was employed for an average time. *And this would be just and equitable, because the fact that the work was discontinuous, and that he was only being paid when he worked, would regulate the rate of wages.* His wages during the days in which he was employed must cover and remunerate him for the enforced unemployment of the intervening period. Similarly the average weekly earnings of a charwoman would not be six times her daily charge; because it would be an incident of her employment to be employed only on so many days in the week as she could find jobs, and the effect of this discontinuity would generally be to make her average week include some idle time.
> * * * * * * * *
>
> "The workman was a casual dock laborer, and there is no dispute as to the rate of payment which such workmen obtain during the time that they are employed. But the employment is a

casual one. The men go to the stand and are taken on for a job, and when that job is over they are discharged, and remain idle for a time or get engaged by some other employer who wants workmen. It is common ground that the workman in question was not in the habit of working for the respondents any more than for any other firm, but took a job, if he wished one, wherever he could find it.

"Under those circumstances I am satisfied that the case comes within the proviso of S. 2 (a) by reason of the casual nature of the employment and otherwise." (Italics ours.)

To the same effect are the following English cases:

*Cue v. Port of London Authority* (1914), 3 K. B. 892, 895, 899, 904;

*Snell v. Mayor of Bristol* (1914), 2 K. B. 291, 294, 296;

And to the same effect see:

*Gillen v. Ocean Accident,* 215 Mass. 96, 102 N. E. 346.

The discontinuous nature of a longshoreman's work was recognized in the other test cases now before this Court.

In

*Mahoney v. Marshall,* 46 Fed. (2d) 539,

the Court said with reference to longshoring conditions in Seattle:

"While the finding is that claimant was subject to call, ready and willing and able to work, but that he was not called, the record shows that the work was necessarily discontinuous, dependent

upon certain conditions indeterminable in advance because of lack of employment. * * *

This from the record appears to be a fixed condition. It is an incident of this employment of which the claimant was advised and the claimant took the risk of the recognized incidents as to work in normal conditions and consideration must be given to that normal equation. This is not an employment of 'clock' or 'whistle,' but of recognized intermittance with the element of discontinuousness."

And in

*Luckenbach v. Marshall,* 49 Fed. (2d) 625,

involving a longshoreman in Portland, the Court said:

"It clearly appears from the record that the work of the claimant, as carried on at the port of Portland, was irregular and discontinuous. Frequently reporting to the place of his employment, and readiness and willingness to work, did not give claimant's employment the characteristics of steadiness. Willingness to work, without the opportunity, does not increase one's earning capacity."

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**DAVIDSON WAS NOT A STEVEDORE IN THE SAME CLASS AS KUGLAND.**

It is apparent from the bare figures given elsewhere in this brief that Kugland was not in the same class as Davidson, earning $2138.95 a year. Therefore, even if this Court should conclude that subdivision (b) can be reasonably and fairly applied to the present case, the Deputy Commissioner has neverthe-

less erred in using Davidson's earnings as a guide, because Davidson and Kugland were not in the "same class." Appellants' brief contends that a classification based upon the number of days worked or the amount of wages received during the year "is purely mythical." If appellants are correct in their contention, it would mean, as we have heretofore pointed out, that every injured stevedore in San Francisco would lawfully receive compensation based upon the earnings of whatever stevedore had been most steadily employed and had received the highest pay during the year preceding the injury. Such a ruling reduces the act to an absurdity. The classification which is shown by the record to exist among the longshoremen in San Francisco is not based solely on actual earnings, but upon individual skill, physique and ability, which when considered in combination with the desire and opportunity for obtaining employment results in a very great difference in earning capacity between the three general groups.

To argue that merely because Kugland and Davidson were both stevedores and therefore in the same class is as illogical as to hold, if there were such a thing as a workman's compensation law covering attorneys, that the average young law school graduate, newly admitted to practice, should have his compensation based upon the income of some famous lawyer with an international reputation, whose income and earning capacity would admittedly be thousands of times greater, simply because both were lawyers.

THE GUNTHER CASE.

Appellants' brief relies entirely upon

*Gunther v. U. S. Employees' Compensation Commission,* 41 F. (2d) 151,

which was decided by the Ninth Circuit Court. We believe that the opinion in that case supports our own position rather than that of appellants. Appellants' brief incorrectly states that the Commissioner applied the provisions of subdivision (b) in the *Gunther* case, when as a matter of fact he applied subdivision (c), but under the particular facts there existing, this Court held that subdivision (b) could have been reasonably and fairly applied.

There was evidence that Gunther was a "hustler" who had steady employment and had been actually earning $40 a week. It was also shown that his annual earnings were about the same as those of another stevedore whose annual earnings were $2100. The Commissioner, using subdivision (c), based the award upon what he believed were Gunther's actual earnings, $893.96 for the year preceding his injury, notwithstanding the fact that there was the conflicting testimony hereinabove mentioned. There was no evidence introduced to show that the application of Sections (a) or (b) would lead to an unfair or unreasonable result. The decision of this Court, while holding that the award should have been made under subdivision (b), did so because it was manifest from the record that $893.96 did not reasonably represent *Gunther's annual earning capacity,* nor did it approximately represent the amount of wages which an employee of the same class as Gunther, working

substantially the whole of the preceding year, would earn. The Court also emphasized the fact that loss of time through accident or injury might make the actual earnings an unfair test of earning capacity, and stated that

> "It was clearly the purpose of Congress that, in case of the accidental injury or death of such employee during the course of his employment, *his ability to earn should be the primal basis of determining compensation.*" (Italics ours.)

And also the Court said, with reference to prior lack of earning capacity:

> "In such case his prior lack of earning or earning capacity, particularly the reason therefor, while a proper matter to be considered in determining his earning power at the time of the accident, nevertheless, it is *that earning power* which is the ultimate fact to be determined in the manner prescribed by the statute." (Italics ours.)

The foregoing decision does not, therefore, in our opinion support the appellants' position in the present case. We believe that under the facts now before this Court Kugland's actual earnings during the year prior to his injury reasonably represented his annual earning capacity.

As was so amply illustrated by the record in the case at bar, *ability* means something more than the mental desire to earn a large sum of money. Many employees of oil companies no doubt have the mental desire for an annual income equivalent to that of the president of the Standard Oil Company, but we ven-

ture to say very few have the mental skill, physical perfection, knowledge, experience and opportunity which would enable them to earn such a sum of money, all of which factors combined are the measure of their ability. In the instant case, Kugland sought work seven days a week, but because of the lack of work and personal disqualifications, his ability was measured by his actual earnings.

Certainly there is nothing in the *Gunther* decision to warrant the use of Davidson's high earnings to determine Kugland's earning power. In the *Gunther* case the Commissioner could properly use the earnings of another stevedore who, according to the testimony, *had earned about the same amount as Gunther* during the year prior to his injury, and was therefore in the same class. We find no language in the Gunther opinion which would warrant the Deputy Commissioner in the present case to disregard the requirement which is contained in both subdivisions (b) and (c) to the effect that the workman whose earnings are taken as a guide for measuring the compensation must be "of the same class" as the man seeking compensation.

It is interesting to note that prior to the *Gunther* decision the United States Employees' Compensation Commission approved of the construction of the Act now urged by the appellees. A departmental construction which has been in effect over a period of time is entitled to the highest respect, and will not be disturbed except for cogent reasons.

*Logan v. Davis,* 233 U. S. 613, 627.

And it has been held that in case of ambiguity the Courts will lean in favor of a construction given to a statute by the department charged with the execution of such statute, and will look with disfavor upon any sudden change whereby parties who have contracted with the government upon the faith of such construction may be prejudiced.

*U. S. v. Alabama,* 142 U. S. 615 at 621;
*Swendig v. Washington Co.,* 265 U. S. 322;
*U. S. v. Minnesota,* 270 U. S. 181.

There is nothing in the *Gunther* decision which justified the Deputy Commissioner in changing the method of computation from that previously and universally employed. Nevertheless, in not only the case at bar, but also in the four other test cases cited at the beginning of this brief, the Deputy Commissioner has departed from the former departmental construction, and in every instance the award has been set aside by the District Court. These opinions of the District Judges are not in opposition to the *Gunther* case, which was in each instance brought to their attention. The District Judge in the present case stated, with reference to the words "same class" in Section 10 (b), and the words "of the same or most similar class" in Section 10 (c):

> "The manifest intention in both sections is to provide a basis for computing the wages of a man who has not worked substantially the whole of the preceding year which shall fairly represent his earning capacity. The use, as a basis for computation, of the average daily wage of a man of a group with higher earning power than that to which the injured employee belongs is not con-

templated by the statute, and for this reason alone the motion to dismiss in each case should be denied."

*Nelson v. Pillsbury,* 48 Fed. (2d), 883 at 885.

We will not include in this brief any discussion or excerpts from these four test cases inasmuch as each one has been fully presented to this Court by the respective counsel upon appeal.

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**Conclusion.**

(1) It is respectfully submitted that subdivisions (a) and (b) of Section 10 can not reasonably and fairly be applied in the present case because Kugland's earning capacity was definitely limited by his own limitations and by the nature of his employment. Kugland's annual earning capacity should therefore be determined by subdivision (c).

(2) Even though this Court should hold that Kugland's compensation should be computed by applying subdivision (b), the decree of the District Court herein should be affirmed because the Deputy Commissioner erred in using the annual earnings of Davidson to compute Kugland's compensation, Davidson not being in the "same class" as Kugland.

Dated, San Francisco,
January 11, 1932.

Respectfully submitted,
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